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Committee on International Relations**

Joint Hearing of the
*Subcommittee on Africa, Global Human Rights
& International Operations* and the
Subcommittee on Asia and the Pacific

“The Internet in China: A Tool for Freedom or Suppression?”

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Microsoft welcomes the opportunity to address the issues surrounding Internet-based services in China. We are deeply concerned about recent events that have prompted widespread public attention to issues of individual security and government control of Internet content in that country. And we are actively seeking ways of maximizing the availability of information and opinion through these services while reducing the risks to individual users.

Microsoft believes that issues of Internet content and customer security go to the heart of our values as a company. The Internet should be fostered and protected as a worldwide vehicle for reliable information and communications, personal expression, innovation and economic development. Microsoft seeks to advance that objective by providing services such as our free Hotmail email service, and free personal websites or “blogs” on the MSN Spaces service, as well as reliable access through the MSN portal to the millions of websites that have made the Internet such a magnet for education,

commerce, entertainment, and, increasingly, for personal communications and expression.

Global Dimensions

At the same time, the Internet raises issues that often justify government attention, especially on matters of individual privacy, law enforcement, and national security. On some of these issues, governments around the world have made differing judgments about the legal standards and policy trade-offs appropriate to their own cultures and national circumstances—in many cases issuing regulations or codes of conduct that define limits on permissible content and prescribe procedures for identifying authorship. While the exercise of governmental responsibilities is usually well-intentioned and limited, it is critically important for the future of the Internet—and thereby for the future of the global community and economy as a whole—that all governments address these issues with deliberation and restraint. Legal and regulatory steps should be taken only with the utmost attention to their wider consequences—including the impact on individuals, enterprises and societies far beyond the borders of the initiating countries. International meetings and bilateral consultations may increasingly help to promote the consistency of national actions and to maximize the openness, security and reliability of the Internet platform. Indeed, the greatest influence over time on national policies affecting the Internet, including those of the Chinese government, is likely to come from a combination of bilateral and multilateral processes of consultation and consensus-building. But the global consultative process is only just beginning to unfold.

In this regard, the U.S. government has a particularly important role to play. As the leading nation in the development and enhancement of the Internet, the United States

has a special responsibility to engage in shaping the political context that will keep it flourishing responsibly. For that reason, the United States should intensify its vital leadership on these issues and initiate discussions with other governments—both bilateral and multilateral--to address restrictions on Internet content that might otherwise create major impediments to the utility of the medium and present unnecessary risks to individual users.

The private sector also has a vital role to play. While retaining its leading role in developing the technologies and standards that protect Internet security and reliability, industry should advocate policies and principles that maximize the value of the Internet for individual users, including basic protections for freedom of expression, commercial integrity and the reliability of information. We have initiated consultations with the companies at this hearing and others to consider the kinds of principles that would advance these values effectively on an industry basis. But, in the end, the legal framework in any particular jurisdiction is not one that private companies are in a position to define for ourselves. National law and policy set parameters in every country in which we do business, and private companies are required to give them due deference as a condition of engaging in business there.

That does not mean that compliance with local law is a matter of deferring reflexively to local authorities or endorsing any specific policy or ideology. Restrictions on content should involve ongoing consultations in which the objective of private operators is to protect the integrity of their services and the privacy of their customers. Where the safety and security of individuals is at stake, it is incumbent on both governments and private companies to assure that requests for customer information in

particular are subject to the highest available standards of legal process. When that information is not maintained in the country concerned, such requests necessarily invoke international agreements that require established government-to-government procedures. When it is maintained in the United States, private operators clearly must comply with applicable U.S. laws protecting on-line privacy, such as the Electronic Communications Privacy Act (ECPA). In addition, Microsoft will seek to provide appropriate notice and transparency to our customers about the standards that will be applied to their communications and the risks they may run if those standards are violated.

Let me be clear on one point: Microsoft will continually review the overall value of our services in any particular country and the conditions created by government policies and practices. If we conclude that those practices undercut or completely compromise the value to customers of our services in that jurisdiction, we will consider withdrawing those services until such conditions improve. But we must always keep squarely in mind whose interests would be best served by such a withdrawal. Will the citizens of that country be better off without access to our services, or will their absence just vindicate those who see our presence in the country as threatening to their official or commercial interests?

China as a Special Case

Microsoft is keenly aware that China presents a special case. Various agencies of the Chinese government are engaged in a substantial effort to manage the kinds of information available to Chinese citizens through the mass media. This effort includes specific regulations restricting the publication on the Internet of news-related content related to “current events news information, reporting and commentary relating to

politics, economics, military affairs, foreign affairs, and social and public affairs, as well as reporting and commentary relating to fast-breaking social events.” These regulations allow government authorities to restrict content for any of a number of reasons ranging from “harming the honor or the interests of the nation” to “disrupting the solidarity of peoples” to “disrupting national policies on religion, propagating evil cults and feudal superstitions” and “spreading rumors, disturbing social order, or disrupting social stability.”¹ And these regulations encompass the kinds of Internet-based services provided by Microsoft’s MSN division. The Chinese government’s approach on these matters is well documented in a Report issued just this month by the well-respected NGO Freedom House.²

Yet, despite those efforts and the serious consequences for individuals who get caught up in the censorship process, the Internet has already transformed the economic, cultural and political landscape of China. In particular, it has had an enormous impact in increasing public access to information. To quote the Freedom House Report:

“While the state has expended considerable effort to limit Chinese access to web pages deemed politically subversive, many users find ways to access blocked Internet sites by using proxies or anti-blocking software. The Internet has increased the speed and convenience of accessing information and decreased the financial costs of interpersonal communication...”

This is the powerful reality in China that we must not lose sight of in our concern for the worst cases of recent times. One recent independent survey of Chinese Internet users found that “48% percent of Internet users believe that by going on line the Chinese will

¹ See the Rules on the Administration of Internet News Information Services, available on-line at <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingl=24396>.

² Ashley Esarey, “Speak No Evil: Mass Media Control in Contemporary China,” A Freedom House Special Report, February 2006, at page 11.

learn more about politics, and ***60% of users believe the Internet will provide more opportunities for criticizing the government.***” [Emphasis added.]³

As described in a New York Times report last week from Shanghai, the Internet offers the best opportunity for ordinary citizens in China to communicate their own observations and opinions and to report the facts about important local events.⁴ Just in the past few years, there have been repeated examples in China of the ways in which official responses to domestic events have been affected by the availability of information and opinions communicated over the Internet. Most prominent have been reports and commentary about the handling of health issues, such as SARS, Avian flu, HIV/AIDS and water contamination. They demonstrate the important role played by the kinds of services that companies like Microsoft provide over the Internet. Since its introduction in China last May, our MSN Spaces blogging service has attracted more than three and a half million users and over fifteen million unique readers, making it the #1 such service in China. As our General Counsel, Brad Smith, noted in reviewing our policies on these services:

We think that blogging and similar tools are powerful vehicles for economic development and for creativity and free expression..... We believe that it's better to make these tools available than not.

Therefore, based on grounds of human rights and freedom of expression alone, Microsoft believes that we should continue to provide our Internet-enabled services in China. That is a judgment that we will continue to evaluate over time, drawing on the

³ "Surveying Internet Usage and Impact in Five Chinese Cities" by Guo Liang, Research Center for Social Development, Chinese Academy of Social Sciences, November 17, 2005, at page 97. (Sponsored by the Markle Foundation. See www.markle.org)

⁴ "Despite Web Crackdown, Prevailing Winds Are Free," Letter from China by Howard French, NY Times, February 9, 2006, at page A4.

best advice we can get, including the opinions of the Members of Congress who follow these issues in China with great interest. If, on the other hand, the outcome of these hearings is to make it impossible for us to continue these services in China—either because of conditions imposed by our government, or because of further actions on the part of the Chinese government—we believe that the Chinese people would be the principal losers—being denied an important avenue of communication and expression.

Microsoft Concerns

Let there be no misunderstanding about the values that underlie Microsoft's decisions on this matter. Our people—from the senior management of the company to the more than 60,000 employees all over the world, including more than 2500 in China itself—care deeply about the impact of our services on the people we serve. We are actively reviewing all of our policies and practices to identify the best ways to protect customers, while providing the widest possible array of information sources.

The example that has received the most attention to our services in China involved the removal of a well-known blogging site on MSN Spaces authored under the pseudonym of “Michael Anti” at the request of the Chinese government. The details of that case have been carefully reviewed, and although we do not think we could have changed the Chinese government's determination to block this particular site, we regret having to do so and have since clarified the manner in which we will deal with similar requests in the future. Those policies seek to assure three things:

First, explicit standards for protecting content access: Microsoft will remove access to blog content only when it receives a legally binding notice from the government

indicating that the material violates local laws, or if the content violates MSN's terms of use.

Second, maintaining global access: Microsoft will remove access to content only in the country issuing the order. When blog content is blocked due to restrictions based on local laws, the rest of the world will continue to have access. This is a new capability Microsoft is implementing in the MSN Spaces infrastructure.

Third, transparent user notification: When local laws require the company to block access to certain content, Microsoft will ensure that users know why that content was blocked, by notifying them that access has been limited due to a government restriction.

Our ongoing reviews may result in other changes of policy as we continue to examine our options and seek the input of a broad array of experts. In addition to active discussions within the industry and with the Executive branch, we have been meeting with NGO's focused on issues of human rights in China and will continue those discussions. We are seeking the advice of recognized experts on China to better understand the dynamics and trends affecting the issues we are addressing here. And we will continue to discuss these issues with Members of Congress, including testimony before appropriate Committees such as this one.

Industry Influence

Finally, let me address the suggestion that Microsoft alone, or in collaboration with other companies in our industry, should be able to change the standards enforced by the Chinese government--or alternatively, to negotiate the manner in which we choose to comply with those standards. Some commentators assert that we are in a position to

temper or delay our degree of compliance with Chinese law and criminal process without losing our license to do business in China. Some have even suggested that we have not tried to pressure the Chinese government in this regard because we seek to curry favor for commercial reasons. These arguments ignore the basic realities of doing business, not only in China, but in most other countries.

Indeed, witnesses at the Congressional Human Rights Caucus two weeks ago suggested or implied that private companies should never provide information to governments about the identity of customers or agree to any sorts of restrictions on Internet content. But the simple fact is that there is not a government in the world, including our own, which would accept such an assertion by a private company seeking to do business within their jurisdiction. Indeed, it is a well-established principle of international jurisdiction that global Internet companies have to follow the law in the countries where they provide services to local citizens, even when those laws are different from those in their country of origin.⁵ Taking the contrary position in defiance of government directives would be tantamount to inviting sanctions--up to and including

⁵ Indeed, even in the United States, both federal and state authorities have prosecuted those involved in offshore gaming activities despite the fact that the online casinos are located in jurisdiction in which the activities are legal. See, e.g., *Vacco v. World Interactive Gaming Corporation*, 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999) (offshore Internet gambling operation held to violate federal laws and the state penal code). The court described the central issue as “whether the State of New York can enjoin a foreign corporation legally licensed to operate a casino offshore from offering gambling to Internet users in New York.” It decided the state could do so because of the “deep-rooted policy of the state against unauthorized gambling.” See also *In re Grand Jury Proceeding, US v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982) (affirming a district court decision holding the Bank of Nova Scotia in civil contempt for failing to comply with an order of the court enforcing a grand jury subpoena requiring it to produce documents in violation of Bahamian bank secrecy laws “even though the very fact of disclosure may subject the Bank to criminal sanctions by a foreign sovereign”).

the prosecution of our employees, the termination of our services in-country and even exclusion of the company from doing business in the country entirely.

When pressed on this point, most observers would no doubt concede that there are circumstances—such as instances of kidnapping, child abuse, or cyber-attack—when the apprehension of serious criminals justifies cooperation with law enforcement authorities even in authoritarian societies—so long as law enforcement is not used as a pretext for political repression. Yet in practice, when companies face law enforcement requests of this kind, there is little room to question the motivations or and second-guess the judgments made by officials in these cases.

In the end, the issue comes back to a difficult judgment of the risks and benefits of these powerful technologies, not just in China, but in a wide range of societies where cultural and political values may clash with standards of openness and free expression. Microsoft cannot substitute itself for national authorities in making the ultimate decisions on such issues. What Microsoft will do is provide the technologies and services that enable individuals and organizations to harness the power of the Internet for their own purposes—if allowed to do so. And we will continue to advocate that people should have the maximum opportunity to use these technologies in exercising those decisions for themselves.

We think that the trend of history and the impact of technology will continue to come down on the side of greater openness and transparency—as it has in China, and as it is likely to do elsewhere. As our Chairman, Bill Gates, said recently in answer to a question about Internet censorship:

“You may be able to take a very visible Web site and say that something shouldn't be there, but if there is a desire by the population to know something, it is going to get out.”

Thank you for this opportunity to address the Subcommittees on these important matters.